Supreme Court, U. S.
FILED
JAN 9 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1092

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AIRLINE DISTRICT LODGE 146, and JAMES R. HAGA, JR.,
Petitioners,

vs.

THE AIR LINE EMPLOYEES ASSOCIATION INTERNATIONAL UNION and JOHN MANCHESTER,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas at Waco

PLATO PAPPS
1300 Connecticut Avenue
Washington, D. C. 20006

L.N.D. WELLS, JR.
MULLINAX, WELLS, BAAB, CLOUTMAN & CHAPMAN, P.C.
8204 Elmbrook Drive, Suite 200
Dallas, Texas 75247
214/630-3672

January 10, 1979.

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Page

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 3

Statement of the Case 3

Reasons for Granting the Writ 6

Argument 11

Conclusion 15

APPENDIX

1. Opinion of Texas Court of Civil Appeals June 22, 1978; 567 S.W.2d 623 ..... A-1

2. Supreme Court of Texas denial of Application for Writ of Error October 18, 1978 (unreported) A-6

3. Excerpts from Railway Labor Act A-7

4. The publication of which respondents complain A-11

Cases Cited

Air Line Employees Assoc. International v. Turner, 291 So.2d 670 (Fla. Dist. Ct. App. 1974), cert. denied, 302 So.2d 135 (Fla. 1974) 7, 9

Breitegger v. Columbia Broadcasting System, 43 Cal. App. 3d 283, 117 Cal. Rptr. 699 (1974) 7

Consolidated Theatres, Inc. v. Stage Employees and Moving Picture Machine Operators, Local 16, 73 Cal. Rptr. 213, 447 P.2d 325 (1968) 7

De Luca v. Reader, 227 Pa. Sup. Ct. 392, 323 A.2d 309 (1974) 7

Dunning v. Boyes, 351 So.2d 883 (Ala. 1977), cert. denied, 77 U.S.L.W. 1123 (1978) 7, 9

Farah Mfg. Co. v. Clothing Workers, 483 S.W.2d 271 (Tex. Ct. App. 1972) 7, 11

Farmer v. Carpenters, 430 U.S. 290, 51 L.Ed.2d 338 (1977) 8, 11

Gabauer v. Woodcock, 520 F.2d 1084 (8th Cir. 1975), cert. denied, 423 U.S. 1061 (1975) 7

General Knit of California, Inc., 239 NLRB No. 10 (1978) 14

In Re Hollywood Ceramics Co., Inc., 140 NLRB 221 (1962) 14

In Re Shopping Kart Food Markets, Inc., 228 NLRB 221 (1977) 14

Lang v. Catterton, 82 LRRM 2549 (Baltimore City Sup. Ct. 1972), appeal dismissed, 267 Md. 268, 297 A.2d 735 (1972) 7

Lang v. Poffenbarger, 31 Ohio App. 2d 239, 287 N.E.2d 827 (1972) 7

Letter Carriers v. Austin, 418 U.S. 264 (1974) ..9, 10, 13, 14

Linn v. United Plant Guard Workers of America, 383 U.S. 53 (1966) 5, 6, 11, 12, 13

McKinnon v. Smith, 52 Misc. 2d 349, 275 N.Y.S.2d 900 (1966), aff'd, 32 App. Div. 2d 615, 300 N.Y.S. 2d 520 (1966) 7, 9

Manchester v. International Association of Machinists and Aerospace Workers, 567 S.W.2d 623 (1978) 2, 5

Mooi Roofing Co. v. DeYoung, 9 Mich. App. 295, 156 N.W.2d 617 (1967) 7, 11

New York Times v. Sullivan, 376 U.S. 254 (1964) 12

R. H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO, 270 N.C. 160, 154 S.E.2d 344 (1968) 7

Thomas v. Flavin, 397 N.Y.S. 2d 286, 58 App. Div. 2d 1031 (1977) 7, 9

Von Solbrig Memorial Hospital v. Licata, 15 Ill. App.3d 1025, 305 N.E.2d 252 (1973) 7, 9

Williams v. Rutherford Freight Lines, Inc., 10 N.C. App. 384, 179 S.E.2d 319 (1971) 7, 9

Other Authorities Cited

The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349 (1975) 9

Case Comment, XXVII U. of Fla. L.R. 560 (1974) .. 9

The Choice of Law in Multistate Defamation—A Functional Approach, 77 Harv. L. Rev. 1462 (1964) 9

Comments, XVIII La. Law Rev. 82 (1967) 9

Community Standards of Defamation, 34 Albany L. Rev. 632 (1970) 9

Developments in the Law of Defamation, 69 Harv. L. Rev. 875 (1956) 9

National Labor Relations Act, 29 U.S.C. § 141 et seq. .. 6, 8

The Railway Act, 45 U.S.C. § 151 et seq. 2, 4

28 U.S.C. § 1257(3) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. .....

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AIRLINE DISTRICT LODGE 146, and JAMES R. HAGA, JR.,
Petitioners,

vs.

THE AIR LINE EMPLOYEES ASSOCIATION INTERNATIONAL UNION and JOHN MANCHESTER,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas at Waco

Petitioners, International Association of Machinists and Aerospace Workers, Airline District Lodge 146 ("Machinists"), and James R. Haga, Jr. ("Haga"), a member of Machinists, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas, entered in this proceeding on June 22, 1978.

OPINION BELOW

The opinion of the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas, rendered June 22, 1978,

is reported at 567 S.W.2d 623, and appears in the Appendix hereto, at p. A-1, *infra*. The Supreme Court of Texas refused Writ of Error, without opinion, on October 18, 1978.

JURISDICTION

The Order of the Supreme Court of Texas refusing Petitioners' application for writ of error was entered on October 18, 1978, and this petition for certiorari is being filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1

In the course of an election conducted by a federal agency, pursuant to a federal statute to resolve a dispute as to which union shall be certified as the bargaining agent, where there is distribution of election propaganda only to eligible voters puffing the merits of one contesting union, and deprecating the abilities and achievements of the rival union, and an unidentified agent of the latter; is an action brought in state court by a union (and its employee) against a rival union, and an individual member thereof, seeking damages for defamatory statements, so published, preempted from state jurisdiction by the federal legislation?

2

Assuming that the action as originally pled is preempted, is state court jurisdiction salvaged by the addition only of a supplemental allegation of the conclusion that: ". . . Defendants intentionally circulated defamatory material known to them to be false or in reckless disregard for the truth and that such conduct constitutes malicious libel for which Plaintiffs should be compensated as set out in Plaintiffs' Original Petition on file herein"?

3

Whether, and to what extent federal labor legislation makes privileged election propaganda distributed only to voters in an election conducted by a federal agency, pursuant to a federal statute to resolve a dispute as to which union shall be certified as the bargining agent?

STATUTORY PROVISIONS INVOLVED

Title 45, U.S.C., Chapter 8, Ninth, entitled "Disputes as to identity of representatives; designation by Mediation Board; secret elections," is reproduced in full in the Appendix, p. A-7, *infra*. It provides for the exclusive jurisdiction of the National Mediation Board (NMB) over disputes as to the selection of employee representatives, and authorizes secret elections to ascertain the employees' designated collective bargaining representative. The statute is clear: "The [National Mediation] Board shall designate . . . and establish the rules to govern the election."

By subsection Eleventh (also reproduced in the Appendix, at p. A-8, *infra*) the rights and duties provided in this legislation are effective "notwithstanding any other provisions of . . . any other statute or law . . . of any state."

STATEMENT OF THE CASE

The Air Line Employees Association International Union (ALEA) and the International Association of Machinists and Aerospace Workers, Airline District Lodge 146 (Machinists) are rival labor organizations, each representing employees in the air transportation industry throughout the nation.

Employees of Texas International Airline became the subject of a representation controversy between ALEA and Machinists—which controversy was submitted to the National

Mediation Board (NMB) for resolution pursuant to the Railway Labor Act.[1]

NMB directed an election in which ALEA and Machinists were the contending unions. In the course of this hotly contested labor election propaganda was distributed only to those who were eligible voters. The election propaganda reflected on the experience and honesty of an employee[2] of the rival union.[3]

The challenged propaganda asserted that ALEA's president "takes for himself" an inordinately high salary; that ALEA does not maintain a skilled or trained staff of negotiators; that one ALEA director, employed as a mechanic by American Airlines was fired "with serious charges, so serious no grievance was filed, . . . he tried to organize an independent union, but it was reported he stole away in the night with the funds in February, 1965, . . ." The pamphlet went on to assert that the airline companies (employers) "actually prefer ALEA because ALEA negotiates the weakest contracts in the industry, and even then, does not really police those weak contracts . . . ALEA trades several grievances to settle one, but the IAMAW [Machinists] handles each case on its own merits every time, and we win most."

In short, the propaganda puffed the merits of Machinists, and deprecated the abilities and achievements of the rival ALEA.

---

[1] The Railway Labor Act, 45 U.S.C. §§ 151 ff, is made applicable to air carriers by 45 U.S.C. § 181, set out in the Appendix hereto, at p. A-10, *infra*.

[2] The individual target of the distribution was not named, but plaintiffs alleged that it was plaintiff Manchester to whom the publications referred.

[3] The alleged publication was "to several hundred members" of ALEA of a "News Bulletin" set out at p. A-11 of the Appendix. This contained pro-IAM and anti-ALEA assertion and argument—claims of superior bargaining power and ability by IAM; and assertions that ALEA was weak, ineffective in bargaining, unable to deliver on its promises, a "Weak company dominated union . . .;" and made assertions reflecting on ALEA's performance as a bargaining agent.

Upon Machinists distribution of this election propaganda, ALEA and its representative, Manchester, filed a civil action for libel under Texas law in the Texas state court in Dallas. The claim was that Machinists, and its member, Haga, "have engaged in a concerted and unlawful attempt to discredit the plaintiff Association in the eyes of its own members" by uttering, publishing, and disseminating untrue and false statements concerning plaintiff John Manchester, a full time paid representative of the Air Line Employees Association . . ." Asserting the publication to be false, defamatory and libelous, ALEA and Manchester sought $250,000.00 actual, plus $500,000.00 exemplary damages.

The Texas state trial court sustained Machinists' and Haga's defenses that Plaintiffs' claim has been preempted by federal law, and the publication of which plaintiffs complain is privileged.

ALEA and Manchester then filed a Supplemental Petition which alleged: "Defendants intentionally circulated defamatory material known to them to be false or in reckless disregard for the truth and that such conduct constitutes malicious libel for which Plaintiffs should be compensated as set out in Plaintiffs' Original Petition on file herein."

The trial court was not persuaded that the addition of this formal conclusionary allegation was sufficient to alter the preemption which he had found on the original pleading—and, accordingly, denied Plaintiffs' Motion for a New Trial.

ALEA and Manchester appealed to the Texas Court of Civil Appeals which held, on the authority of this Court's majority opinion in *Linn v. United Plant Guard Workers of America*, 383 U.S. 53 (1966). "That *Linn* governs the case at bar, and the federal law does not preempt the Plaintiff's cause of action in the state court for defamation." 567 S.W.2d at 625-626. That court also held that the publications were not privileged. *Ibid.*, at 626.

The Supreme Court of Texas, on October 18, 1978, refused the Application for Writ of Error filed by Machinists and Haga.[4] Thus, by final judgment rendered by the highest court of the State of Texas the claims of preemption and privilege have been denied.

REASONS FOR GRANTING THE WRIT

The preemption issue is important. Substantially the same issue was presented, on less compelling facts, in *Linn v. United Plant Guard Workers of America*, 383 U.S. 53 (1966),[5] where this court recognized "the question before us has been a recurring one in both state and federal tribunals." 383 U.S. at 57, and ruled 5 to 4 that recognition of state interests to compensate for libel would not unduly interfere with effective administration of national labor policy.

Four justices, in two separate dissents, expressed the fear that arming the disputants with the weapon of libel suits and the threat of punitive damages would undermine the federal structure for resolving labor disputes. The majority itself had doubts, for at 383 U.S. at 67, the majority wrote ". . . if experience shows that a greater curtailment [of state libel actions], even a total one, should be necessary to prevent impairment of that

---

[4] This Application for Writ of Error sought review of two "points of error," viz:

'1. The Court of Civil Appeals erred in holding that Plaintiffs-Appellants' (Respondents') alleged cause of action is not preempted by federal law.'

'2. The Court of Civil Appeals erred in holding that the publications in question, made solely to voters in a federally conducted labor election, are not absolutely privileged.' "

[5] The majority there stated the issue, 383 U.S. at 55:

". . . whether and to what extent, the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. § 141, *et seq.* (1964 ed.), bars the maintenance of a civil action for libel instituted under state law by an official of an employer subject to the Act, seeking damages for defamatory statements published during a union organizing campaign by the union and its officers."

[national labor] policy, the court will be free to reconsider today's holding."

It is now time to reconsider, for in the decade since *Linn* state court libel claims arising out of labor conttroversies have proliferated.[6] And as in the instant case, the *Linn* rule that a

---

[6] *Dunning v. Boyes*, 351 So. 2d 883 (Ala. 1977) *cert. denied* 77 U.S. L.W. 1123 (1978) (state action not preempted when epithet "bigot" is applied); *Thomas v. Flavin*, 397 N.Y.S.2d 286, 58 App. Div.2d 1031 (1977) (calling an employee a "scab" is not libelous and state court is preempted from jurisdiction); *Gabauer v. Woodcock*, 520 F.2d 1084 (8th Cir. 1975) (applying Missouri law) *cert. denied*, 423 U.S. 1061 (1975) (when alleged libel contained in letter dismissing employee from union office which was sent only to union officers state court is preempted from jurisdiction), *Air Line Employees Assoc. International v. Turner*, 291 So.2d 670 (Fla. Dist. Ct. App. 1974) *cert. denied*, 302 So.2d 135 (Fla. 1974) (state court has jurisdiction when a union officer calls a union member a "scab" and a "fink"); *DeLuca v. Reader*, 227 Pa. Sup.Ct. 392, 323 A.2d 309 (1974) (no preemption when company charges employee with "dishonestly withholding company funds"); *Breitegger v. Columbia Broadcasting System*, 43 Cal.App.3d 283, 117 Cal. Rptr. 699 (1974) (no preemption where union said that employee was fired for misconduct and inefficiency); *Von Solbrig Memorial Hospital v. Licata*, 15 Ill. App.3d 1025, 305 N.E.2d 252 (1973) (no preemption where employer charged with unfair labor practices in leaflet); *Farah Mfg. Co. v. Clothing Workers*, 483 S.W.2d 271 (Tex. Ct. App. 1972) (no preemption because plaintiff alleged malicious libel); *Lang v. Poffenbarger*, 31 Ohio App. 2d 239, 287 N.E.2d 827 (1972) (no preemption when individuals allegedly charged with engaging in perverted sexual acts); *Lang v. Catterton*, 82 LRRM 2549 (Baltimore City Sup. Ct. 1972), *appeal dismissed*, 267 Md. 268, 297 A.2d 735 (1972) (no preemption because Plaintiff alleged malicious libel); *Williams v. Rutherford Freight Lines, Inc.*, 10 N.C.App. 384, 179 S.E.2d 319 (1971) (state action preempted where employer called union officials gangsters); *Consolidated Theatres, Inc. v. Stage Employees and Moving Picture Machine Operators, Local 16*, 73 Cal. Rptr. 213, 447 P.2d 325 (1968) (state action is preempted unless the National Labor Relations Board has indicated it would decline to assert its jurisdiction); *R. H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO*, 270 N.C. 160, 154 S.E.2d 344 (no preemption where plaintiff proves malice); *Mooi Roofing Co. v. DeYoung*, 9 Mich. App. 295, 156 N.W.2d 617 (1967) (no preemption where plaintiff alleges malicious libel); *McKinnon v. Smith*, 52 Misc. 2d 349, 275 N.Y.S.2d 900 (1966) *aff'd*, 32 App. Div.2d 615, 300 N.Y.S.2d 520 (1966) (no preemption where defendant inferred that plaintiffs were communists).

union which intentionally defames an employer in an organizing campaign is subject to state court damage action, is enlarged to the point that state courts may now censor the writings of institutional contestants in representation elections. This result ignores the federal statute which requires that the federal agency "shall designate . . . and establish the rules to govern the election." 29 U.S.C. 152, Ninth.

It also ignores the admonition in *Farmer v. Carpenters* that "something more is required before concurrent state court jurisdiction can be permitted," that the alleged state tort must be peripheral to the federally controlled activity. 430 U.S. 290 at 305, 51 L.Ed.2d 338 at 353 (1977). State censorship of election propaganda reaches the heart of federally controlled union representation activities.

The election rules as to allowable propaganda are thus—in reality—those disparate concepts of "malice", "intent", "privilege," applied by state court juries in accordance with local notions of the proprieties of speech, and the social value (or social detriment) which state court jurors believe attributable to labor unions.

If the instant decision is the law a contestant in a federal labor election which, as here, involves employees from California to Mississippi, must tailor publication of election materials to the local notions of the appropriate application of disparate laws as to defamation. This is an impossible task.[7] Different states have contradicted each other on what constitutes malicious libel in labor disputes. For example, "scab"

[7] The difficulty when the law of only a single state must be considered, is multiplied to impossibility when, as here, employees of a multi-state employer are faced with election. Texas, California and Mississippi have disparate notions as to defamation—as do the other states which Texas International serves.

was libelous in Florida,[8] but not in New York.[9] Decisions holding that the epithets "bigot"[10] and "communist"[11] are actionable in state court, but that "gangster"[12] and "dictator"[13] are not reduce the drafter of campaign literature to guessing what he may write or simply writing in the blandest manner. Indeed, the writer must act with knowledge of the state of the law of defamation as to which one law review article explained: "Nothing short of a major treatise could catalogue the various attitudes, doctrines, and practices which courts in fifty states have applied in defamation actions." 61 Va. L.Rev. 1349 at 1351 (1975).[14]

Ostensibly, it is federal policy to favor uninhibited robust and wide open debate in labor representation disputes; indeed this Court has recently asserted that unions may not be pro-

[8] *Air Line Employees Assoc. International v. Turner*, 291 So.2d 670 (Fla. Dist. Ct. App. 1974), *cert. denied*, 302 So.2d 135 (Fla. 1974).

[9] *Thomas v. Flavin*, 397 N.Y.S.2d 286, 58 App. Div.2d 1031 (1977). This court settled the difference in favor of preemption in *Letter Carriers v. Austin*, 418 U.S. 264 (1974).

[10] *Dunning v. Boyes*, 351 So.2d 883 (Ala. 1977), *cert. denied*, 77 U.S.L.W. 1123 (1978).

[11] *McKinnon v. Smith*, 52 Misc.2d 349, 275 N.Y.S.2d 900 (1966), *aff'd* 32 App.Div.2d 615, 300 N.Y.S.2d 520 (1966).

[12] *Williams v. Rutherford Freight Lines, Inc.*, 10 N.C.App. 384, 179 S.E.2d 319 (1971).

[13] *Von Solbrig Memorial Hospital v. Licata*, 15 Ill.App.3d 1025, 305 N.E.2d 252 (1973).

[14] See also *"Community Standards of Defamation,"* 34 Albany L. Rev. 632 (1970), which demonstrates the extent to which community standards vary with location, reflecting the various prejudices of different sections of the country, with the result depending on "the social habits, customs and prejudices prevailing in the jurisdictions in question," *Ibid.* at 639.

Cf. 69 Harv. L. Rev. 875-960, "Developments in the Law of Defamation," (1956); 77 Harv. L. Rev. 1462-1484, "The Choice of Law in Multistate Defamation—A Functional Approach," (1964); XVIII La. Law Rev. 82-109 (1967); XXVII U. of Fla. L.R. 560 (1974).

hibited from uttering intemperate, abusive or insulting language. *Old Dominion Branch, etc. Letter Carriers v. Austin*, 418 U.S. 264 (1974). That policy is thwarted if those utterances must be cut to fit the disparate notions of a multitude of states.

ARGUMENT

I

The problem of the extent to which federal labor legislation supercedes state laws with respect to libels published during labor disputes requires "accomodation of the federal interest in regulation of labor relations with the traditional concern and responsibility of the state to protect its citizens against defamatory attacks," *Linn, supra*, 383 U.S. 53 at 57, 58.

The majority in *Linn*, recognizing that state libel actions threatened interference with national labor policy, sought to minimize that consequence (383 U.S. at 64) by permitting them only where the defamatory statements were circulated with malice, with knowledge of their falsity or with reckless disregard of whether they were true or false. (*Ibid*, at 65).

The case at bar, and many of those cited in footnote 6, *supra*, prove this expectation invalid. For the post *Linn* cases show that he who wishes to exploit the state claim which he has originally pled in conventional state court terms, and which the state court has dismissed as unduly intrusive upon the federal domain, adds a conclusionary paragraph in a Supplemental Petition, adding no *factual* allegations, but merely using the magic words, "malice," and "reckless disregard of whether true or false," and Presto! the claim which was exclusively federal becomes a valid state claim.[15]

---

[15] *Farah Mfg. Co. v. Clothing Workers*, 483 S.W.2d 271 (Tex. Ct. App. 1972); *Lang v. Catterton*, 82 LRRM 2549 (Baltimore City Sup. Ct. 1972), *appeal dismissed*, 267 Md. 268, 297 A.2d 735 (1972); *Mooi Roofing Co. v. DeYoung*, 9 Mich. App. 295, 156 N.W.2d 617 (1967).

This ability to transform a federal action into a state claim with the addition of a few words ignores the admonition of *Farmer v. Carpenters* that "something more is required before concurrent state court jurisdiction can be permitted," that the alleged state tort must be peripheral to the federally controlled activity. 430 U.S. 290 at 305, 51 L.Ed.2d 338 at 353 (1977). State review of election propaganda for alleged libelous statements directly interferes with federal control of union representation activities.

The *New York Times v. Sullivan* requirement, under constitutional compulsion, that public figures recover in defamation actions only upon proof of malice, and reckless disregard of truth, served a necessary constitutional function of First Amendment protection.

But that requirement when not dealing with a constitutional free speech issue, but solely with the degree to which state remedies have been preempted by federal legislation, is not only inappropriate, it subjects the federal system of control of labor relations to censorship by state tribunals, by the mere addition of the allegation of a legal conclusion to an otherwise preempted state of facts.

Whether or not those additional conclusions may ultimately be supported is irrelevant; for a federal election, and publications made to voters in that election, no longer are subject to exclusive federal regulations—the propriety of the publication becomes the subject of state court determination. And as the dissenters in *Linn* prophesied, 383 U.S. 70-71;

> "These requirements that petitioner plead and prove both malice and special damages—arising from what I regard as the Court's well-founded concern that libel suits might otherwise 'pose a threat to the stability of labor unions and smaller employers'—may be cold comfort to the potential defendant in a libel suit. 'Malice,' which the Court defines as a deliberate intention to falsify or a malevolent desire to injure, is, after all, a largely subjective standard, responsive to the ingenuity of trial counsel and the predilections of judge and jury. And 'injury' resulting from words is not limited to tangible trauma. These requirements afford dubious defense on a battlefield from which the qualified umpire—the NLRB—has been removed. In a libel suit, the outcome is determined by standards alien to the subject matter of labor relations, by considerations which do not take into account the complex and subtle values that are at stake, and by a jury unfamiliar with the quality of rhetoric customary in labor disputes. The outcome, in fact, is more apt to reflect immediate community attitudes toward unionization than appreciation for the underlying, long-term perplexities of the interplay of management and labor in a democratic society."

2

Since *Linn*, this Court has had occasion to observe in *Letter Carriers v. Austin*, 418 U.S. 229 (1974) that ". . . application of *Linn* must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection of freedom of speech are significantly implicated . . . ."

The court below (and those listed in footnote 6, *supra*) erred in failing to identify the context of the publication—at the very heart of the federal process—where workers are choosing the representative who will have the powers and duties of collective representatives. It is at this point that chilling of union exercise of the right of persuasion is most damaging to the federal policy which favors uninhibited, robust and wide open debate in labor disputes. And as this Court recognized in *Letter Carriers*, 418 U.S. 277 at note 12; "Wide latitude for what is written and said in election campaigns is necessary to insure the free exchange of information and opinions, and thus to promote the informed choice by the employees needed to make the system work freely and effectively."

The Texas court's opinion subjects that necessary "free exchange of information and opinion" to the judgment of a Dallas County jury applying its concepts of 'malice'.

This court's efforts to assure that local juries stay on track, by disapproval of instructions couched in common law terms, (*Letter Carriers*, at 418 U.S. 281) while protecting against state courts' definitions in a jury charge—still leave it wide open to a jury to find "malice" in accordance with their predilections.

And the "independent" examination of "the whole record" by this Court, *Letter Carriers* at 418 U.S. 282, many years after the event, provides no real protection to the union agent whose powers of persuasion are chilled by the prospect of justifying his publication to a Dallas, Texas, jury.

The nice distinctions which the federal law requires between "rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards [a rival union] . . ." which is recognized as "commonplace in labor disputes and protected by federal law" (418 U.S. at 286) on the one hand; and on the other, the "reckless disregard of whether false or not" (383 U.S. at 61, 63, 65) are surely lost on a Texas jury. If the federal policy is to be effective it must be administered by a federal tribunal.

3

Even the expertise of the federal tribunal is taxed in ordaining and effectuating fair rules regarding election publications. Compare, for example, the meanderings of the NLRB in evaluating "misleading campaign statements" from *In Re Hollywood Ceramics Co., Inc.*, 140 NLRB 221 (1962), through *In Re Shopping Kart Food Markets, Inc.*, 228 NLRB 221 (1977), to last week's abandonment of *Shopping Kart* and partial return to *Hollywood Ceramics* in *General Knit of California, Inc.*, 239 NLRB No. 101 (1978).

When there is superimposed on that federal regulation the notions of state courts in fifty jurisdictions, freedom of expression and uninhibited, robust and wide open debate in labor disputes is necessarily chilled. And those who suffer from the chill are the workers, mature individuals who are entitled to be informed—and who are capable of recognizing campaign propaganda for what it is.

Accordingly, *Linn* should be reconsidered—or at least limited to its facts—and workers in federal elections left free to receive election publications from the contending entities, subject only to the regulation of the federal tribunal.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Texas Court of Civil Appeals.

Respectfully submitted,

PLATO PAPPS
1300 Connecticut Avenue
Washington, D.C. 20006

L.N.D. WELLS, JR.
MULLINAX, WELLS, BAAB,
CLOUTMAN & CHAPMAN, P.C.
8204 Elmbrook Drive, Suite 200
Dallas, Texas 75247
214/630-3672

Attorneys for Petitioners

APPENDIX

OPINION OF THE WACO COURT OF CIVIL APPEALS OF TEXAS

John Manchester et al., Appellants,

v.

International Association of Machinists and Aerospace Workers et al., Appellees.

No. 5866.

Court of Civil Appeals of Texas, Waco.

June 22, 1978.

Rehearing Denied July 14, 1978.

Frederick M. Baron, Dallas, for appellants.

L.N.D. Wells, Jr., Mullinax, Wells, Mauzy & Baab, Inc., Dallas, for appellees.

OPINION

James, Justice.

This is a libel and slander case. Plaintiff-Appellants John Manchester and the Air Line Employees Association International Union (hereinafter called "ALEA") brought this suit in a District Court of Dallas County against Defendant-Appellees James R. Haga and the International Association of Machinists and Aerospace Workers, Air Line District 146 (hereinafter called "IAM"). Plaintiffs Manchester and ALEA alleged that the Defendants published and disseminated untrue and false statements concerning the Plaintiffs; moreover, it was alleged by Plaintiffs that such defamatory material was known by the Defendants to be false or in reckless disregard for the truth. Plaintiffs sought

actual damages for the injury to their good name, reputation and business, and exemplary damages for the wilful and malicious character of the acts.

The Defendants filed special exceptions to Plaintiffs' pleadings, two of which assert that Plaintiffs failed to allege a cause of action because: (1) Plaintiffs' claim is one that has been pre-empted by Federal law, and (2) the publication of which Plaintiffs complain are absolutely privileged.

The trial court sustained the Defendants' special exceptions hereinabove referred to and dismissed Plaintiffs' case because of Plaintiffs' failure to "state a cause of action of which this court has jurisdiction," and further, because "the publications of which Plaintiffs complain are privileged in the circumstances alleged." From said order of dismissal Plaintiffs appeal upon two points of error, to wit, the trial court erred in dismissing the cause for want of jurisdiction in that (1) Plaintiffs have properly plead a claim that is not pre-empted by Federal law (here, the Railway Labor Act); and (2) the publications of which Plaintiffs complain are not absolutely privileged in the circumstances alleged by Plaintiffs. We sustain these contentions, and thereby reverse and remand the cause for reinstatement on the trial court's docket for trial on the merits.

Plaintiff Manchester is an officer and director of Plaintiff ALEA. Defendant Haga is an officer of Defendant IAM. During the summer of 1976, a Federal representation election was in progress, to decide whether ALEA or IAM would be the union representative for certain airline workers. For some time prior to the election, ALEA had represented the workers in question, and IAM was seeking to replace ALEA as the union representative of said workers.

Plaintiffs alleged that the publication complained of was made to "several hundred members" of ALEA in the form of

a "News Bulletin" or "Fact Sheet." Plaintiffs alleged that Defendant Haga, acting in concert with and at the direction of Defendant IAM published such "Fact Sheet," stating, among other things, that a certain "ALEA Director was employed as a mechanic (?) with American Airlines . . . and was fired with serious charges, so serious . . . no grievance was filed . . . ;" and that "he tried to form an independent mechanics' union, but it was reported he stole away in the night with the funds in February 1965 . . ." and that, further, "although he had never attended one negotiating session in his life, nor had he ever served one day as a shop steward, he was hired by ALEA." Manchester was never called by name in the publications complained of; however, Plaintiffs alleged that it was obvious to the great majority of individuals who received the publication that the person referred to therein was Plaintiff Manchester. As stated before, Plaintiffs alleged that Defendants intentionally published or disseminated information known to them to be false or in reckless disregard for the truth. These publications were distributed by Defendants directly to members of Plaintiffs' organization during the time of said election campaign.

We revert to Plaintiff-Appellants' first point, to wit, the contention that Plaintiffs have alleged a cause of action not pre-empted by Federal law. We sustain this contention.

The general rule concerning the pre-emption doctrine was set forth by the United States Supreme Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959):

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central

aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." Also see *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25* (1977) 430 U.S. 290, 97 S.Ct. 1056, 1061, 51 L.Ed.2d 338. Although the statute pertinent to the case at bar is the Railway Labor Act, 45 U.S.C. sections 151-188, rather than the National Labor Relations Act, the policies embraced in the National Labor Relations Act may be referred to in order to determine whether conduct is within the general penumbra of conduct held protected under the Act or whether it is beyond the pale of any activity thought permissible. See *Brotherhood of Railway Trainmen v. Jacksonville Terminal Co.* (1969) 394 U.S. 369, 384, 89 S.Ct. 1109, 1118, 22 L.Ed.2d 344.

The pre-emption doctrine announced in *Garmon*, supra, was qualified, or rather an exception was made thereto, in *Linn v. United Plant Guard Workers of America, Local 114* (1966) 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582. In *Linn* it was held that where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him. More specifically, the Court limited the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were made with knowledge of their falsity or with reckless disregard of whether such statements were true or false.

In the case at bar, the Plaintiffs alleged that the libelous publications were known by the Defendants to be false or in reckless disregard for the truth. We are of the opinion and hold that *Linn* governs the case at bar, and the Federal law does not pre-empt the Plaintiffs' cause of action in the state court for defamation. See *Farah Manufacturing Co. v. Amal-*

gamated Clothing Workers of America (San Antonio CA 1972) 483 S.W.2d 271, 274, no writ.

Plaintiff-Appellants' second and remaining point asserts the trial court erred in dismissing the cause because the libellous publications in question are not absolutely privileged in the circumstances alleged by Plaintiff-Appellants. We agree that the publications are not absolutely privileged.

We recognize that Federal labor policies favor uninhibited, robust, and wide-open debate in labor disputes, and that Federal law gives unions license to use intemperate, abusive, or insulting language. See *Old Dominion Branch No. 496, National Assn. of Letter Carriers, AFL-CIO v. Austin* (1974) 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745. However, *Old Dominion* does not depart from the *Linn* rule hereinabove set out. In other words, the freedom of expression is not immune unless it "falls short of a deliberate or reckless untruth."

In the case at bar Plaintiffs alleged that the defamatory publication included accusations in effect that Plaintiff Manchester was a thief, in that he "stole away in the night with (union) funds." Such alleged accusations when coupled with allegations that Defendants had knowledge of their falsity or were in reckless disregard of their falsity, in our opinion brings the instant case squarely under the rule announced in *Linn*, supra. Any privilege connected with the libellous statements would at best be qualified and not absolute.

For the reasons herein stated, we reverse and remand the cause to the trial court for reinstatement on the locket and trial on the merits.

REVERSED AND REMANDED.

DENIAL OF APPLICATION FOR WRIT OF ERROR BY THE SUPREME COURT OF TEXAS

Clerk's Office—Supreme Court

———

Austin, Texas

Oct. 18, 1978

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of International Association of Machinists etc. v. Manchester et al., No. B-7831 was this day refused. No reversible error.

Very truly yours,

Garson R. Jackson, Clerk

———

STATUTES INVOLVED

The portions of the Railway Labor Act, as amended, involved in this case are Section 2, Ninth, 45 U.S.C. § 152, Ninth; Section 2, Eleventh, 45 U.S.C. § 152, Eleventh and Section 31, U.S.C. § 181.

Section 2, Ninth states:

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Section 2, Eleventh states:

Union security agreements; check-off

Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the ex-

piration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

Section 31 states:

All of the provisions of sections 151 to 152 and 154 to 163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

PUBLICATION OF WHICH RESPONDENTS COMPLAIN

Gearing Up To Freedom

FROM A WEAK COMPANY DOMINATED UNION OF LIES, DECEIT AND MISREPRESENTATION.
DON'T YOU THINK IT IS ABOUT TIME YOU GET YOUR MONEY'S WORTH!!!!

Facts You Should Know

IT'S A... FACT The majority of Texas International's Clerical craft have signed IAMAW authorization cards because you are not satisfied with pitiful lack of representation by the weak ALEA. You have been lied to and "Taken for Granted" entirely too long. It's Time To VOTE IAM.

AND **IT'S A... FACT** Your dues dollar is not best used for YOU. Example: ALEA's president, with only a few thousand members, takes for himself a salary almost twice what IAMAW's president is paid and the IAMAW has almost a million members.

AND **IT'S A... FACT** ALEA DOES NOT maintain a fully trained, highly skilled staff of contract negotiators and administrators. Example: One ALEA director was employed as a mechanic (?) with American Airlines. He was fired with serious charges, so serious--no grievance was filed.

AND **IT'S A... FACT** He tried to form an independent mechanics' union, but it was reported he stole away in the night with the funds in February 1965. Although he had never attended one negotiating session in his life, nor had he ever served one day as a shop steward, he was hired by ALEA.

AND **IT'S A... FACT** All airline companies actually prefer ALEA because ALEA negotiates the weakest contracts in the industry, and, even then, does not really police those weak contracts. ALEA LIES TO YOU AND IAMAW will prove it.

AND **IT'S A... FACT** ALEA claims it processed 3b cases to system board. IAMAW issues complete grievance reports showing results of all cases won and also all cases lost. HAVE YOU EVER SEEN A COMPLETE GRIEVANCE REPORT FROM ALEA???? ALEA trades several grievances to settle one, but the IAMAW handles each case on it's own merits every time, and we win most.

AND **IT'S A... FACT** Under IAMAW, the TI Clerical members will have their own local lodge, and your own full time, union paid representative for your own group. He will give a complete activity report at each of your monthly membership meetings, and all questions answered.

AND **IT'S A... FACT** With monthly IAMAW meetings, the members really run their own union, and professional help is there when you need it. The representative selected from your group will be trained and assisted by skilled IAMAW Representatives. All are from the airline industry, and fully experienced.

AND **IT'S A... FACT** There are many other points you should know before you vote. IAMAW will prove many statements by ALEA are deliberate lies. IAMAW will prove how ALEA cheats you with your Company contract. BE SURE TO SEE THE NEXT IAMAW BULLETIN.

WEIGH THE FACTS

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

SUPREME COURT, U. S.
FILED
FEB 28 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1092

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AIRLINE DISTRICT LODGE 146, and JAMES R. HAGA, JR.,

Petitioners,

vs.

THE AIR LINE EMPLOYEES ASSOCIATION INTERNATIONAL UNION and JOHN MANCHESTER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
To The Court of Civil Appeals For The Tenth Supreme Judicial District of Texas at Waco

FREDERICK M. BARON
BARON & COWLEY
A Professional Corporation
8333 Douglas Avenue
Suite 1400
Dallas, Texas 75225
(214) 369-3605
Attorneys for Respondents

February 21, 1979

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS 75206 — (214) 742-3965

INDEX

	Page
Table of Citations	ii
Counter-Statement of the Questions Presented	2
Counter-Statement of the Case	2, 3
Reasons for Denying the Writ	4, 7
Conclusion	8

Table of Citations

Cases: Page

Brotherhood of Railway Trainmen v. Jacksonville Terminal Co., 349 U.S. 369, 384, 89 S.Ct. 1109, 1118, 22 L.Ed.2d 344 (1969) 4

Farah Mfg. Co. v. Amalgamated Clothing Workers, 483 S.W.2d 271 (Tex.Civ.App.—San Antonio 1972, no writ) 5, 7

Farmers v. Carpenters, 430 U.S. 290 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) 5, 7, 8

Linn v. United Plant Guard Workers of America, 338 U.S. 53 (1966) 3, 4, 5, 6, 7, 8

Manchester v. International Association of Machinists and Aerospace Workers, 567 S.W.2d 623 (Tex.Civ.App.—Waco 1978, writ ref'd) 6, 7

Nat'l Association of Letter Carriers v. Austin, 418 U.S. 264 (1974) 6

Old Dominion Branch #494, National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974) 4, 6, 7, 8

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959) 4, 6

Other Citations

Railway Labor Act, 45 USC §151 et. seq. 4

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1092

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AIRLINE DISTRICT LODGE 146, and JAMES R. HAGA, JR.,

Petitioners,

vs.

THE AIR LINE EMPLOYEES ASSOCIATION INTERNATIONAL UNION and JOHN MANCHESTER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
To The Court of Civil Appeals For The Tenth Supreme Judicial District of Texas at Waco

---

Respondents, John Manchester and The Air Line Employees International Union, file this Brief in Opposition to the Petition for Writ of Certiorari and respectfully pray that such writ be denied.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Is the state court pre-empted of jurisdiction over a defamation case which has been brought to collect damages sustained by complainants for malicious statements which were disseminated in reckless disregard of their truth or falsity?

2. Are libelous statements made during a labor representation dispute qualifiedly privileged or absolutely privileged?

COUNTER-STATEMENT OF THE CASE

Plaintiff Manchester is an officer and director of Plaintiff ALEA. Defendant Haga is an officer of Defendant IAM. During the summer of 1976, IAM and ALEA were involved in an election wherein IAM was challenging ALEA's position as the established union representative for certain airline workers. During IAM's "raid" of ALEA's membership, Haga, acting in concert and at the direction of IAM, published and disseminated to ALEA's membership a "fact sheet" which stated that a certain "ALEA Director was employed as a mechanic(?) with American Airlines . . . and was fired with serious charges, so serious . . . no grievance was filed . . .", and that "he tried to form an independent mechanics' union, but it was reported he stole away in the night with the funds" and that, further, "although he had never attended one negotiating session in his life, nor

had he ever served one day as a shop steward, he was hired by ALEA."

Plaintiffs filed their Original Petition in the Trial Court alleging that although Manchester's name was not mentioned within the fact sheet, it was obvious to the great majority of its membership that the person referred to therein was Manchester. Plaintiffs further alleged that Defendants knew that the information disseminated was false or that such information was distributed in reckless disregard for its truth. As such, the information was malicious and libelous to Plaintiffs and resulted in damages to their good name, reputation and business.

Prior to receiving evidence, the Trial Court dismissed Plaintiffs' cause of action on the grounds that jurisdiction was pre-empted by Federal Law and that the communications were absolutely privileged.

Relying on the rule announced in *Linn v. United Plant Guard Workers of America*, 383 U.S. 53 (1966), the Texas Court of Civil Appeals reversed the Trial Court on both the pre-emption and the privilege issues, finding that the Trial Court was not preempted of jurisdiction over cases involving malicious libel, and that such libelous statements were only qualifiedly privileged.

The Texas Supreme Court agreed with Appellate Court's decision by refusing to grant Defendants' Petition for Writ of Error.

In this petition, Plaintiffs are the Respondents and Defendants are the Petitioners.

REASONS FOR DENYING THE WRIT

1. The decision announced by the Texas Court of Civil Appeals was correct in establishing that cases of malicious libel are not pre-empted from state court jurisdiction by the Railway Labor Act 45USC §151-188.

In arriving at its decision, the court recognized the general rule that the pre-emption doctrine requires state court jurisdiction to be pre-empted when such courts are asked to regulate activities which are in the exclusive protection of the National Labor Relations Act or which arguably constitute an unfair labor practice. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). Even though not involved in the case at bar, the policies embraced in the National Labor Relations Act may be referred to in order to determine whether conduct is within the general penumbra of conduct held protected by the Railway Labor Act. *Brotherhood of Railway Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 384, 89 S.Ct. 1109, 1118, 22 L.Ed.2d 344 (1969).

However, as the appellate court recognized, the *Garmon* pre-emption doctrine is not absolute. On several occasions this court has recognized that an exception exists to the general pre-emption doctrine for malicious and injurious statements which are circulated during a labor dispute. *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966); *Old Dominion Branch #496, National Association of*

Letter Carriers v. Austin, 418 U.S. 264 (1974); *Farmer v. Carpenters*, 430 U.S. 290, 97 S.Ct. 1056 51 L.Ed.2d 338, 352 (1977). This Court, in rendering its landmark decision in *Linn*, found that malicious libel falls outside the protective ambit of the Act. Thus it was held that the exercise of state court jurisdiction in these instances would be merely a peripheral concern of federal policy in contrast to "an over-riding state interest in protecting its residents from malicious libels." *Linn*, 383 U.S. at 61.

Furthermore, the fact that defamation arises during a labor dispute does not give the National Labor Relations Board exclusive jurisdiction, since "malicious publication of libelous statements does not in and of itself constitute an unfair labor practice." *Id.* at 63. Hence, the injury of an individual's reputation is irrelevant to the Board's function. The Board cannot award damages, impose penalties, nor give any other relief to an individual defamed during an election contest. *Id.* at 63. "On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation." *Id.* at 63-64.

As in the case at bar, which fits squarely within the *Linn* fact situation, when a plaintiff alleges that defendants have been guilty of malicious defamation, a state court has the power to deal with such conduct. See *Farah Mfg. Co. v. Amalgamated Clothing Workers*, 483 S.W. 2d 271 (Tex. Civ. App. — San Antonio 1972, no writ).

To allow such an exception does not intrude upon the ostensible federal policy of favoring uninhibited robust and wide-open debate in representation disputes. *Old Dominion Branch #494, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974). For as the Texas appellate court remarked, the statement of federal policy in *Old Dominion* does not depart from the *Linn* rule as herein stated. *Manchester v. International Association of Machinists and Aerospace Workers*, 567 S.W.2d 623 (Tex. Civ. App. — Waco 1978, writ ref'd). And, as Respondent and this court have continually asserted, to create protection for intentional misrepresentations published with reckless disregard for their truth, would be to distort the intent of the pre-emption doctrine as laid down in *San Diego Building Trades*, and interpreted by *Old Dominion*.

By granting Petitioner's writ, this court would be considering an issue it laid to rest in *Linn*. Therefore, Respondent respectfully prays that the writ be denied.

2. The Texas Court of Civil Appeals correctly held that the libelous publications disseminated by the Petitioner are not absolutely privileged in the circumstances alleged by Respondents.

Federal Labor policies favor uninhibited, robust and wide-open debate in labor disputes and tolerate intemperate, abusive or insulting language. *Old Dominion*, 418 U.S. at 264. However, this Court has not permitted this policy to give either party to a

campaign license to intentionally injure others by circulating defamatory or insulting material known to be false. *Linn*, 383 U.S. at 61. "It must be emphasized that malicious libel enjoys no constitutional protection in any context." *Linn* 383 U.S. at 63. Intentional defamation is not protected under the Act. *Farmers*, 430 U.S. at 302, 51 L.Ed.2d at 349. The decisions in *Old Dominion* and *Linn* are coexistent, for as the Texas Appellate Court remarked, "*Old Dominion* does not depart from the *Linn* rule hereinabove set out." *Manchester*, 567 S.W.2d at 626.

Since Federal labor laws do not protect defamatory statements which are published with knowledge of their falsity or with reckless disregard for the truth, such statements are only qualifiedly privileged. *Linn*, 383 U.S. at 53; *Old Dominion*, 418 U.S. at 264. Without an absolute protection for malicious libel, an inquiry is permitted into the motive and reasonableness of the statements. Thus, as in the instant case, a cause of action exists, over which State Courts have jurisdiction. See *Farah Mfg.* 483 S.W. 2d at 271.

With this in mind, the appellate court correctly held that when the accusations made by Petitioner that Respondent Manchester, "stole away in the night with the union funds" are coupled with allegations that Petitioner had knowledge of their falsity or were in reckless disregard of their falsity, the instant case is squarely within the rule announced by *Linn*. "Any privilege connected with the libelous statements would at best be qualified and not absolute." *Manchester*, 567 S.W.2d at 626.

CONCLUSION

In rendering the *Linn* decision, this court laid to rest the troublesome and recurring question involving the extent to which the National Labor Relations Act supercedes state law with respect to libel published during labor disputes.

The same question is presented here by Petitioner and need not be re-examined. This court has consistently held that state courts have jurisdiction to apply state remedies if the complainant pleads and proves the libelous statements were injurious and malicious.

The guidelines established by *Linn* are clear and enduring. Its vitality has been strengthened by this court's recent decisions in *Old Dominion* and *Farmer*. Petitioner does not present any new conflicts in social policy which would necessitate this court's reconsidering its above mentioned prior decisions.

Therefore, Respondent respectfully prays that Petitioner's Writ of Certiorari be denied.

Respectfully submitted,

FREDERICK M. BARON
BARON & COWLEY
A Professional Corporation
8333 Douglas Avenue
Suite 1400
Dallas, Texas 75225
(214) 369-3605
Attorneys for Respondents

February 21, 1979